

1997

State of Utah v. Friis : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Attorney for Respondent.

Floyd W Holm; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	Case No. 970565-CA
vs.)	
)	
ROBERT EDGAR FRIIS,	)	Classification Priority 2
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

Appeal from a Judgment, Sentence and Commitment of the Fifth Judicial District Court, in and for Iron County, State of Utah, the Honorable J. Philip Eves, District Judge, presiding.

FLOYD W HOLM
Attorney for Defendant-Appellant
965 South Main, Suite 6
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

JAN GRAHAM
Utah Attorney General
Attorney for Plaintiff-Respondent
236 State Capitol Building
Salt Lake City, Utah 84111

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970565-CA

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FLOYD W HOLM
Attorney for Defendant-Appellant
965 South Main, Suite 6
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

JAN GRAHAM
Utah Attorney General
Attorney for Plaintiff-Respondent
236 State Capitol Building
Salt Lake City, Utah 84111

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THE STATE OF UTAH,
Plaintiff-Respondent,
VS.
ROBERT EDGAR FRIIS,
Defendant-Respondent.

Case No. 9700565-CA

The Utah Court of Appeals has jurisdiction of this matter because is an appeal from a court of record in a criminal case not involving a conviction of a first-degree or capital felony. Utah Code Ann. § 78-2a-3(2)(e) (1996).

Did the lower Court abuse its discretion in failing to allow Defendant to withdraw his plea on the grounds of breach of the plea agreement?

The standard of review for denial of a motion to withdraw a guilty plea is whether it clearly appears that the trial court abused its discretion by failing to find good cause. *State v. Gentry*, 797 P.2d 456 (Utah Ct. App. 1990).

The above issue was preserved for appeal by virtue of Defendant's oral Motion to Withdraw Guilty Plea. (Transcript of

September 8, 1997, hearing [hereinafter "9/8/97 Tr."] 15.)

TEXT OF AUTHORITIES

A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the Court. Utah Code Ann., § 77-13-6(2)(a) (1994).

STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal action against Defendant for Theft, a Class-A Misdemeanor.

B. Course of the Proceedings

Pursuant to a plea bargain agreement, Defendant was charged under an Amended Information for Theft, a Class-A Misdemeanor, arising from the alleged theft of a motor vehicle. Such plea was entered on or about July 21, 1997. At the time of sentencing on September 8, 1997, after various comments made by counsel for the Plaintiff, which Defendant believed to be a breach of the plea agreement, Defendant orally moved to withdraw his plea of guilty. Although the lower Court initially granted Defendant's motion and set the matter for trial, upon request of the State, the lower Court reconsidered its decision.

C. Disposition at Trial Court

At an evidentiary hearing on September 16, 1997, the lower Court ultimately denied the motion to withdraw plea and entered judgment against Defendant and sentenced him to serve a

term of ninety (90) days in the Iron County Jail.¹

D. Statement of Facts

On July 21, 1997, Defendant entered into a plea bargain agreement with the State of Utah whereby he pled guilty to Theft, a Class A Misdemeanor. A written "Statement of Defendant Regarding Guilty Plea, Certificates of Counsel and Order" (hereinafter "plea agreement") was prepared, executed by all the parties and filed with the Court. The matter, after obtaining a Pre-Sentence Investigation Report, was set for sentencing on September 8, 1997. (R. 66-72).

Paragraph 11 of the plea agreement provides, *inter alia*, that "the State of Utah has agreed to make no recommendations regarding sentencing (i.e. to submit the matter to the Court without comment)." (R. 69).

At the time of sentencing on September 8, 1997, counsel for the State of Utah made certain comments to the Court about the length of jail time that would be appropriate, as well as whether Defendant should be allowed a furlough before reporting for his term of incarceration pursuant to the sentence the Court had imposed. At that time, Defendant asked to withdraw his plea of guilty by virtue of the State's breach of the plea agreement, and the Court granted his motion. The matter was then set for trial for December 4, 1997. (9/8/98 Tr. 6-8, 13-15).

¹Although, arguably, this appeal is moot since the ninety (90) day term of incarceration has now been served, as a result of his conviction of the above offense, Defendant was found to have violated his probation on other felony offenses and, as a result, was committed to the Utah State Prison, where he remains.

Subsequent to the court hearing, counsel for the State was successful in bringing the matter again before the Court who agreed to hold an evidentiary hearing regarding whether a withdrawal of plea on the oral motion was appropriate. (9/8/98 Tr. 20-23).

At the evidentiary hearing, upon reviewing the videotape of the 9/8/98 hearing, the Court found that the Defendant's request for time to report for sentencing did not relate to the sentence of the Court and that comments about the length of jail time to be served was merely a clarification and not intended to prejudice the Defendant. (Transcript of September 16, 1997 hearing 13-16).

SUMMARY OF ARGUMENT

POINT I: The State's counsel clearly made comments regarding the appropriate term of incarceration for Defendant and regarding whether he should be granted a furlough prior to reporting for his term of incarceration. Both such comments materially breached the plea agreement, and it was an abuse of discretion by the trial court not to find that such breach constituted good cause for Defendant to withdraw his plea.

ARGUMENT

POINT I

BECAUSE THE STATE BREACHED THE PLEA AGREEMENT,
THERE WAS GOOD CAUSE TO ALLOW DEFENDANT TO
WITHDRAW HIS PLEA

As a general rule, the lower court has discretion whether to grant a motion to withdraw a guilty plea. *State v. Gentry*, 797 P.2d 456, 457 (Utah Ct. App. 1990); *State v. Vasilacopulos*, 946

P.2d 92, 93 (Utah Ct. App. 1988). In *Gentry* this Court held that if the Court fails to find good cause where such good cause exists, it has abused its discretion. *Gentry*, 797 P.2d at 457. Moreover, the Utah Supreme Court has held that in exercising such discretion, the courts should, in general, "liberally" grant motions to withdraw pleas. *State v. Gallegos*, 738 P.2d 1040, 1042 (Utah 1987). See also *Santobello V. New York*, 404 U.S. 257, 268 (1971). Specifically, the *Gallegos* court stated as follows:

The entry of a guilty plea involves the waiver of several important constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witness. Because the entry of such a plea constitutes such a waiver, and because the prosecution will generally be unable to show that it will suffer any significant prejudice if the plea is withdrawn, a presentence motion to withdraw a guilty plea should, in general, be liberally granted.

Id., at 1041-42 (footnote omitted).

The appellate courts of this State have yet to determine whether a breach of a written plea agreement by the State constitutes good cause to withdraw a plea. However, the lower Court apparently determined that such was good cause when it initially granted Defendant's motion. The Supreme Court of Maryland, in a case factually similar to the case at bar, has likewise held that if a prosecutor agrees to make no recommendations as to sentence and then violates that agreement, the Defendant may have his guilty plea vacated. *Miller v. State*, 272 Md. 249, 322 A.2d 527, 530 (1974). See also *Santobello*, 404 U.S. at 262; *Darnell v. Timpani*, 68 Wash.2d 666, 414 P.2d 782, 783-84 (1966). Likewise, in *Commonwealth v. Alvarado*, 442 Pa. 516, 276

A.2d 526, 529 (1971), the Pennsylvania Supreme Court held that a promise to make no comment or recommendation at sentencing means a "commitment not to make any damning or even potentially damaging statements at the time of sentencing."

In the instant case, the State has failed to show any prejudice that would result if Defendant were allowed to withdraw his plea. Any delay in trial affects Defendant equally as much as the State.² The State, in its plea agreement, agreed to make no comment whatsoever at the time of sentencing. Instead, it commented both on the way jail time should be calculated (which could result in prejudice to Defendant by serving additional time) and by further objecting to a furlough prior to the commitment of Defendant.

Any attempts by the State to "clarify" when time should be computed for Defendant's sentence constituted a "comment" regarding the meaning of the Pre-Sentence Investigation Report and was at least potentially damaging to Defendant's position at sentencing.

The State will likely argue that a delay in commencement of the commitment in no way affected the sentencing, because the Court had already imposed its sentence, and it was merely a question of when such sentence would commence. The date the sentence would commence was of importance to Defendant, however, because it would allow him to handle financial and other matters that he would not

²Defendant's motion may have been untimely under Section 77-13-6(2)(b) in that it was not made within thirty days of the entry of his plea; however, such untimeliness, if any, was not raised by the State and, therefore, should not be considered by this Court. *State v. Smith*, 812 P.2d 470, 475-76 (Utah Ct. App. 1991).

be able to handle it the commitment were to commence immediately. (9/8/97 Tr. 5-6). In summary, then, an immediate commitment would have imposed a greater "punishment" on Defendant than if the temporary furlough were allowed. Thus, the lower Court's finding that the State's arguments in support of its objection to the furlough were harmless and did not affect the "sentence", were unfounded.

Giving Defendant the benefit of the doubt, and based upon the holding in *Gallegos*, the lower Court should have liberally construed the plea agreement and found a breach thereof. Accordingly, it should have found that such breach constituted good cause and allowed Defendant to withdraw his plea.

CONCLUSION

Based upon the above discussion, this Court should reverse the Judgment, Sentence and Commitment of the lower Court and remand for the purposes of entry of a not-guilty plea so that the matter can proceed to trial.


RESPECTFULLY SUBMITTED this 27th day of May, 1998.


FLOYD W. HOLM
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that on this 27th day of May, 1998, I mailed, first class, postage prepaid, two (2) true and correct copies of the above and foregoing BRIEF OF APPELLANT to:

Ms. Jan Graham
Utah Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114


FLOYD W. HOLM

ADDENDUM

SCOTT M. BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,	)	STATEMENT OF DEFENDANT
	)	REGARDING GUILTY PLEA,
Plaintiff,	)	CERTIFICATES OF COUNSEL,
	)	AND ORDER
vs.)	
ROBERT EDGAR FRIIS,	)	Criminal No. 971500112
)	
Defendant.	)	Judge J. Philip Eves

STATEMENT OF DEFENDANT REGARDING GUILTY PLEA

I, ROBERT EDGAR FRIIS, the above-named Defendant, under oath, hereby acknowledge that I have entered a plea of guilty to the offense of THEFT, a Class A Misdemeanor, contained in the Amended Information on file against me in the above-entitled Court, a copy of which I have received and read, and I understand the nature of the elements of the offense for which I am pleading guilty. I further understand the charge to which this plea of guilty is entered is a class A misdemeanor, and that I am entering such plea voluntarily and of my own free will after conferring with my attorney, Floyd W Holm, and with the knowledge and understanding of the following facts:

1. I know that I have constitutional rights under the Constitution of Utah and the United States to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of

guilty, or to a trial by the Court should I elect to waive a trial by jury. I know I have a right to be represented by counsel and that I am in fact represented by Floyd W Holm.

2. I know that if I wish to have a trial in Court upon the charge, I have a right to be confronted by the witnesses against me by having them testify in open court in my presence and before the Court and jury with the right to have those witnesses cross-examined by my attorney. I also know that I have the right to have witnesses subpoenaed by the State at its expense to testify in Court upon my behalf and that I could, if I elected to do so, testify in Court on my own behalf, and that if I choose not to do so, the jury can and will be told that this may not be held against me if I choose to have the jury so instructed.

3. I know that if I were to have a trial that the State must prove each and every element of the crime charged to the satisfaction of the Court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself; and that any verdict rendered by a jury, whether it be that of guilty or not guilty, must be by a unanimous agreement of jurors.

4. I know that under the Constitutions of Utah and of the United States that I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify in Court upon trial unless I choose to do so.

5. I know that under the Constitutions of Utah that if I were tried and convicted by a jury or by the Court that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me, and to have the assistance of counsel on such appeal.

6. I know that if I wish to contest the charge against me, I need only plead "not guilty" and the matter will be set for trial, at which time the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous. I know and understand that by entering this plea of guilty, I am waiving my constitutional rights as set out in the preceding paragraphs and that I am, in fact, fully incriminating myself by admitting I am guilty of the crime to which my plea of guilty is entered.

7. I know that under the laws of Utah the possible maximum sentence that can and may be imposed upon my plea of guilty to the charge identified on page one of this Statement, and as set out in the Amended Information, is as follows:

- (A) *Incarceration in the Iron County/Utah State Correctional Facility for a period not to exceed one (1) year; and*
- (B) *Fined in any amount not in excess of two thousand five hundred dollars (\$2,500), plus an eighty-five percent (85%) surcharge;*

I further understand that the imprisonment may be for consecutive periods if my plea is to more than one charge. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have pleaded guilty, my plea in the present action may result in consecutive sentences being imposed on me. I also know that I may be ordered by the Court to make restitution to any victim or victims of my crime.

8. I know that the fact that I have entered a plea of guilty does not mean that the Court will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead guilty or that it will be made lighter because of my guilty plea.

9. No threats, coercion, or unlawful influence of any kind have been made to induce me to plead guilty, and no promises, except those contained herein, have been made to me. I know that any opinions made to me, by my attorney or other persons, as to what he or they believe the Court may do with respect to sentencing are not binding on the Court.

10. I know that under the laws of Utah should I desire to move the Court to set aside my guilty plea entered in this case, I must do so within thirty (30) days of the entry of the plea or my right to do so will be lost. I further understand that a plea of guilty may be withdrawn only upon a showing of good cause and with permission of the Court.

11. No promises of any kind have been made to induce me to plead guilty except that I have been told that if I do plead guilty, the State has agreed to file an Amended Information therein charging me with THEFT, a Class A Misdemeanor, as opposed to the original charges of RECEIVING STOLEN PROPERTY, a Second-Degree Felony; DUI, a Class B Misdemeanor; and POSSESSION OF DRUG PARAPHERNALIA, a Class B Misdemeanor. Moreover, I am aware that the State of Utah has agreed to make no recommendations regarding sentencing (i.e. to submit the matter to the Court without comment). No other promises have been made. I am also aware that any charge or sentencing concessions or recommendations for probation or suspended sentences, including a reduction of the charge for sentencing made or sought by either defense counsel or the prosecutor are not binding on the Court and may not be approved or followed by the Court.

12. I have read this Statement or I have had it read to me by my attorney, and I understand its provisions. I know that I am free to change or delete anything contained in this Statement. I do not wish to make any changes because all of the statements are correct.

13. I am satisfied with the advice and assistance of my attorney.

14. I am _____ years of age, I have attended school through the _____ grade, and I can read and understand the English language. I was not under the influence of any drugs, medication, or intoxicants when the decision to enter the plea was made. I am not presently under the influence of any drugs, medication, or intoxicants.

15. I believe myself to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently, and voluntarily entering my plea.

16. I have discussed the contents of this Statement with my attorney and ask the Court to accept my plea of guilty to the charge set forth in this Statement because I did, in fact, on or about February 3, 1997, in Iron County, State of Utah, knowingly and intentionally exercise unauthorized control over the property of another (Crestview Cadillac), said property having a value in excess of \$300.

DATED this 21st day of July, 1997.

151
ROBERT EDGAR FRIIS
Defendant

CERTIFICATE OF DEFENSE ATTORNEY

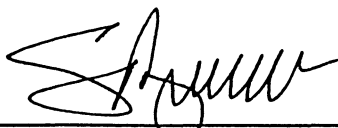
I certify that I am the attorney for ROBERT EDGAR FRIIS, the Defendant named above, and I know he has read the Statement, or that I have read it to him; and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief after an appropriate investigation, the elements of the

crime and the factual synopsis of the Defendant's criminal conduct are correctly stated, and these, along with the other representations and declarations made by the Defendant in the foregoing Statement, are accurate and true.

15/
FLOYD W HOLM
Attorney for Defendant

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in its case against ROBERT EDGAR FRIIS, Defendant. I have reviewed the Statement of the Defendant and find that the declarations, including the elements of the offense and the factual synopsis of the Defendant's criminal conduct which constitutes the offense are true and correct. No improper inducements, threats, or coercions to encourage a plea have been offered to the Defendant. The plea negotiations are fully contained in this Statement or as supplemented on the record before the Court. There is reasonable cause to believe the evidence would support the conviction of the Defendant for the offense for which the plea is entered and acceptance of the plea would serve the public interest. Finally, I have discussed the terms of this agreement with the victim and the investigating agency in this case, and said victim and agency fully support and agree with said plea agreement.


SCOTT M. BURNS
Iron County Attorney

ORDER

Based upon the facts set forth in the foregoing Statement of Defendant Regarding Guilty Plea and the foregoing Certificates of Counsel, the Court finds the Defendant's plea of guilty is freely and voluntarily made, and it is so ordered that Defendant ROBERT EDGAR FRIIS' plea of "guilty" to the charge set forth in the foregoing Statement be accepted and entered.

The foregoing Statement of Defendant was signed before me this 21st day of July, 1997.

BY THE COURT:

/s/
J. PHILIP EVES
District Court Judge

FILED
10/14/97

SCOTT M. BURNS (#4283)
Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694

FILED

SEP 29 1997

5th DISTRICT COURT
IRON COUNTY

[Signature] Deputy Clerk

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,	)	JUDGMENT, SENTENCE,
	)	AND COMMITMENT
Plaintiff,)	
vs.)	
ROBERT EDGAR FRIIS,	)	Criminal No. 971500112
)	
Defendant.	)	Judge J. Philip Eves

The Defendant, ROBERT EDGAR FRIIS, having entered a plea of guilty to the offense of THEFT, a Class A Misdemeanor, on July 21, 1997, and the Court having accepted said plea of guilty and thereafter having ordered the preparation of a presentence investigation report prior to sentencing, and upon completion of said report, the above-entitled matter having been called on for sentencing on September 8, 1997, in Parowan, Utah, before the Honorable J. Philip Eves, and the above-named Defendant, ROBERT EDGAR FRIIS, having appeared before the Court in person together with his attorney of record, Floyd W Holm, and the State of Utah having appeared by and through Iron County Attorney Scott M. Burns, and the Court having reviewed the presentence investigation report and having further reviewed the file in detail, and thereafter having heard statements from the Defendant and his attorney, and the Court being fully advised in the premises now makes and enters the following Judgment, Sentence, and Commitment, to wit:

COPIES

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, ROBERT EDGAR FRIIS, has been convicted of the offense of THEFT, a Class A Misdemeanor, and the Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, ROBERT EDGAR FRIIS, and pursuant to his conviction of THEFT, a Class A Misdemeanor, is hereby sentenced to a term of incarceration for a period of ninety (90) days, and the Defendant is hereby placed in the custody of the Iron County Sheriff.

IT IS FURTHER ORDERED that the Defendant shall commence serving the term of incarceration set forth above (90 days) on September 19, 1997, at 9:00 a.m.

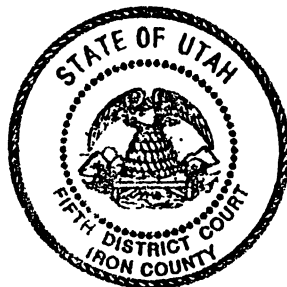
IT IS FURTHER ORDERED that no fine and no restitution shall be imposed by the Court.

COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, ROBERT EDGAR FRIIS, and deliver him to the Iron County/Utah State Correctional Facility in Cedar City, Utah, there to be kept and confined in accordance with the above and foregoing Judgment, Sentence, and Commitment.

DATED this 25th day of September, 1997.



J. Philip Eves
J. PHILIP EVES
District Court Judge